

FINAL STATEMENT OF REASONS

a) Specific Purpose of the Regulations and Factual Basis for Determination that Regulations Are Necessary

Sections 101170(o) et seq.

Specific Purpose:

The specific purpose of these sections is to implement and make specific the Department of Social Services' authority to require a licensee to cease operation or remove an individual, specified in Health and Safety Code Section 1596.871(b), from the facility for up to 30 days when it determines that any licensee or individual has been arrested for a crime for which, if convicted, the individual would not be eligible, by law, to receive an exemption. These regulations also specify how the Department will notify the licensee and the individual.

Factual Basis:

There are approximately 50 crimes for which, if convicted, an individual would not be eligible for an exemption including murder/attempted murder, kidnapping, sexual battery, rape, aggravated assault of a child, willful cruelty to a child, and sexual abuse. These sections are necessary because without these regulations, the Department has no recourse but to allow the licensee to remain operating or the individual to remain working or living in the facility during the investigation, thus presenting a possible risk to the health and safety of children in care.

Sections 101170(p) et seq.

Specific Purpose:

The specific purpose of these sections is to establish a process by which the licensee or individual may appeal the Department's notification to cease operation or remove an individual. These regulations also impose a specific timeframe by which the Department must notify the licensee or individual of its decision.

Factual Basis:

These sections are necessary to ensure the licensee or individual is afforded an opportunity to appeal the facility's temporary closure or the individual's removal from a facility based on any of the following: he or she is not the individual who was arrested; he or she has not been arrested for a crime that by law an individual is not eligible to receive an exemption; or he or she was arrested for a crime that by law an individual is not eligible to receive an exemption but the charges have been dropped or reduced to a crime that by law an individual would be eligible for an exemption.

Section 101170(q)

Specific Purpose:

The specific purpose of this section is to require the Department to rescind the notice to cease operation or the notice to remove an individual, if during the 30 days specified in Sections 101170(o)(1) and (o)(2), the Department determines that criminal charges have been dropped or reduced to a charge for a crime that by law an individual would be eligible to receive an exemption.

Factual Basis:

This section is necessary to clarify that if during the 30-day investigation period the Department determines that the criminal charges against the licensee or individual have been dropped or reduced to a charge for a crime that by law would be eligible for an exemption, the Department must rescind the notice.

Section 101170(r)

Specific Purpose:

The specific purpose of this regulation is to specify that nothing in this section shall be interpreted to supercede the Department's authority to temporarily suspend the license in accordance with Health and Safety Code Section 1596.886 or immediately exclude an individual in accordance with Health and Safety Code Section 1596.8897.

Factual Basis:

This regulation is necessary to clarify that nothing in this section supercedes the Department's authority to issue a temporary suspension or exclusion order.

Sections 102170(n) et seq.

Specific Purpose:

The specific purpose of these sections is to implement and make specific the Department of Social Services' authority to require a licensee to cease operation or remove an individual, specified in Health and Safety Code Section 1596.871(b), from the facility for up to 30 days when it determines that any licensee or individual has been arrested for a crime for which, if convicted, the individual would not be eligible, by law, to receive an exemption. These regulations also specify how the Department will notify the licensee and the individual.

Factual Basis:

There are approximately 50 crimes for which, if convicted, an individual would not be eligible for an exemption including murder/attempted murder, kidnapping, sexual battery, rape, aggravated assault of a child, willful cruelty to a child, and sexual abuse. These sections are necessary because without these regulations, the Department has no recourse but to allow the licensee to remain operating or the individual to remain working or living in the facility during the investigation, thus presenting a possible risk to the health and safety of children in care.

Sections 102170(o) et seq.

Specific Purpose:

The specific purpose of these sections is to establish a process by which the licensee or individual may appeal the Department's notification to cease operation or remove an individual. These regulations also impose a specific timeframe by which the Department must notify the licensee or individual of its decision.

Factual Basis:

These sections are necessary to ensure the licensee or individual is afforded an opportunity to appeal the facility's temporary closure or the individual's removal from a facility based on any of the following: he or she is not the individual who was arrested; he or she has not been arrested for a crime that by law an individual is not eligible to receive an exemption; or he or she was arrested for a crime that by law an individual is not eligible to receive an exemption but the charges have been dropped or reduced to a crime that by law an individual would be eligible for an exemption.

Section 102170(p)

The specific purpose of this section is to require the Department to rescind the notice to cease operation or the notice to remove an individual, if during the 30 days specified in Sections 102370(n)(1), (n)(2) and (n)(3), the Department determines that criminal charges have been dropped or reduced to a charge for a crime that by law an individual would be eligible to receive an exemption.

Factual Basis:

This section is necessary to clarify that if during the 30-day investigation period the Department determines that the criminal charges against the licensee or individual have been dropped or reduced to a charge for a crime that by law would be eligible for an exemption, the Department must rescind the notice.

Section 102370(q)

Specific Purpose:

The specific purpose of this regulation is to specify that nothing in this section shall be interpreted to supercede the Department's authority to temporarily suspend the license in accordance with Health and Safety Code Section 1596.886 or immediately exclude an individual in accordance with Health and Safety Code Section 1596.8897.

Factual Basis:

This regulation is necessary to clarify that nothing in this section supercedes the Department's authority to issue a temporary suspension or exclusion order.

b) Identification of Documents Upon Which Department Is Relying

- Health and Safety Code Sections 1596.81 and 1596.871

c) Local Mandate Statement

These regulations do not impose a mandate on local agencies or school districts. There are no state-mandated local costs in these regulations which require state reimbursement under Section 17500, et seq. of the Government Code.

d) Statement of Alternatives Considered

CDSS has determined that no reasonable alternative considered or that has otherwise been identified and brought to the attention of CDSS would lessen any adverse impact on small business.

e) Significant Adverse Economic Impact On Business

CDSS has determined that the proposed action will not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

f) Testimony and Response

These regulations were considered as Item #3 at the public hearing held on October 15, 2003 in Sacramento, California. Written testimony was received from Debra L. Back, Staff Attorney, Children's Advocacy Institute, during the 45-day comment period from August 29, to 5:00 p.m. October 15, 2003. The comments received and the Department's responses to those comments follow.

Comment:

New section 101170(o), Title 22 of the CCR, states as follows:

"If the Department determines that any licensee or individual specified in Health and Safety Code Section 1596.871(b) is arrested for a crime for which, if convicted, an individual is not eligible, by law, to receive an exemption, pending completion of its investigation into the facts underlying the arrest, the Department **may** take the following actions..."

It appears the Department is relying on the arrested individual to self-report within 48 hours of the arrest. See proposed section 101170(m), Title 22 of the CCR, contained in the Department's Criminal Record Exemption regulations. However, if the arrested individual is an employee of the facility, or even the licensee, there is no incentive to self-report if that could mean loss of a job or revenue. Is this the only means by which the Department can become aware of such an arrest? Will the Department conduct any random audits or visits to licensed facilities to ensure there are no convicted/arrested individuals working at or running the facility?

In addition, the use of the word "may" in the section quoted above (instead of "shall") causes great concern. As stated in the Department's Initial Statement of Reasons, "there are approximately 50 crimes for which, if convicted, an individual would not be eligible for an exemption including *murder/attempted murder, kidnaping, sexual battery, rape, aggravated assault of a child, willful cruelty to a child, and sexual abuse.*" These are significant crimes. If an individual working in a licensed facility is arrested for one of these heinous acts, the Department must remove that individual immediately, at least for the 30 day period, until a full investigation can be completed. There should be no room for discretion once the Department is made aware of such an arrest.

The Department's own statements in its Finding of Emergency and Notice/Informative Digest indicate that DSS is required to take certain action upon becoming aware of arrest information for specified crimes. For instance, section 1 states "[t]hese emergency regulations specify the procedures the Department **will follow** to require a licensee to cease operation or remove an individual from the facility for up to 30 days pending the Department's investigation into the facts underlying the arrest" (emphasis added). Section 2 of the Finding of Emergency further states these regulations "would protect the health and safety of children in licensed child care by **requiring** that the licensee cease operation or that the individual not be present in the facility for up to 30 days pending the investigation..." (emphasis added). The arrested individual is already entitled to an appeal of such a removal, which provides sufficient due process protections in a very short time frame.

Similarly, the word "may" found in new sections 101170[(o)](1) and (2) should also be changed to "shall" in order to truly protect children at these facilities and to provide the Department with full implementation and enforcement rights.

Specific statutory language, including Health and Safety Code sections 1596.871(c)(2) and 1522(c)(3), provides the Department with authority to remove an individual arrested for

such violent crimes (for which no exemptions can be sought), in order to protect children. If the Department determines that it will not include the word "shall," thus not making the temporary removal or closure mandatory, the regulations should specify under what circumstances such a refusal to act would be warranted. The same arguments can be made for proposed sections 102370(n)(1), (n)(2), and (n)(3), Title 22 of the CCR. The words "may" should be changed to "shall" and the phrase "as it deems necessary" should be stricken. In the alternative, guidance should be provided as to how the Department arrives at such a decision not to take immediate removal/closure action.

Response:

The Department receives arrest information from a variety of sources, however, 90% of the information comes from the Department of Justice as part of the criminal background check. When the Department receives arrest information from Department of Justice or other source, a triage process is used to ensure the most serious crimes receive immediate attention and investigation.

When the Department determines that an individual has been arrested for a crime for which, if convicted, the individual would not be eligible for an exemption, an investigation is immediately initiated. If the Department is not able to secure evidence that is admissible and could prove the conduct to a standard of a preponderance of the evidence within a short amount of time, the Department will notify the facility to immediately cease operation or remove the employee pending the completion of an investigation, for up to 30 days. Additionally, if the Department is able to determine during the investigation that the facts in the case do not support a finding that the individual committed an act which, if proven, would be a non-exemptible crime, it needs to retain the discretion to not order the removal of the individual or the closure of the facility. The Department has found that individuals are occasionally arrested for non-exemptible crimes which, upon investigation, would not result in a conviction for a non-exemptible crime. An example of this type of arrest is burglary. Individuals are sometimes arrested for burglary, but only charged with petty theft after review by the local District Attorneys Office. First degree burglary is a non-exemptible crime. On the other hand, petty theft is neither a non-exemptible crime nor one that would in most circumstances warrant immediate removal or closure of a facility.

Health and Safety Code Sections 1522(c)(3) and 1596.871(c)(2) require the Department to remove an individual convicted of specific crimes. While these emergency regulations authorize the Department to remove an individual from or close a facility for up to 30 days if arrest information is received for a crime for which, if convicted, the individual would not be eligible for an exemption, the Department immediately makes an effort to secure evidence to support an action to terminate the individual or the license before applying this authority.

g) 15-Day Renotice Statement

CDSS did not renote these regulations because no changes requiring renote were made to the regulations following the public hearing.